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In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES,
ET AL., APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Section 1302 para. 5 of Title 18 makes it a crime knowingly to mail "any newspaper, circular, pamphlet, or publication of any kind" containing "any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such lottery or similar enterprise. The question presented is whether the prize list clause in Section 1302 is facially invalid under the First Amendment.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the United States Postal Service and the United States of America were named as defendants in the court below.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-20a) is reported at 677 F. Supp. 1400.

JURISDICTION

The judgment of the district court (App., *infra*, 21a-22a) was entered on January 6, 1988. A notice of appeal (App., *infra*, 23a-24a) was filed on January 28, 1988. On March 17, 1988, Justice Blackmun entered an order extending the time within which to docket this appeal to and including May 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted at App., *infra*, 25a-33a.

STATEMENT

This is an action brought by an association of Minnesota newspapers challenging, under the First Amendment and the Due Process Clause, the congressional regulation of the use of the mails in connection with the promotion of lotteries, 18 U.S.C. 1302 and 1307; 39 U.S.C. 3001 and 3005. On cross-motions for summary judgment, the district court held that the statutory ban on mailing lottery advertisements was a valid regulation of commercial speech. By contrast, the court held that an associated prohibition on the mailing of prize lists was invalid, on the ground that the clause could be used to ban the mailing of newspapers containing news reports about lotteries.

A. Historical And Statutory Background

1. Lotteries have an ancient pedigree. In England and in colonial times in this country, lotteries were a popular and respectable activity.[1] Beginning in the Jacksonian period, however, the states began to restrict or prohibit both privately-operated and state-run lotteries for a variety of reasons, such as "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the

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[1] See generally J. Ezell, *Fortune's Merry Wheel* 1-59 (1960); A. Spofford, *Lotteries in American History*, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 174-195 (1893); National Inst. of L. Enforcement & Crim. Just., LEAA, U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776-1976*, at 500-519 (1977) [hereinafter *The Development of the Law of Gambling*]; Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978).

poor upon whom the burden of the lottery system was thought to fall."[2]

A major obstacle to that reform effort was the states' inability to regulate lotteries that operated across state lines. The states lacked authority to prosecute lottery operators who conducted business in another jurisdiction, or to regulate a lottery operator's use of the mails to distribute tickets and advertisements. The states were forced to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task."[3] The states therefore turned to the Post Office and to Congress for assistance.

2. Congressional restrictions on the use of the postal service in connection with lotteries date from 1827. In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress passed legislation prohibiting the mailing of letters or circulars concerning "illegal" lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. That term, however, was stricken four years later in order to exclude from the mails materials from all lotteries, including ones chartered by state legislatures. Act of July 12, 1876

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[2] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927. The dominant Nineteenth Century view was that lotteries were harmful to society. See, *e.g.*, *Champion* v. *Ames (Lottery Case)*, 118 U.S. 321, 356-358 (1903); *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1879); *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850).

[3] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931.

(1876 Act), ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)).[4]

This Court upheld the constitutionality of the 1876 Act in *Ex parte Jackson*, 96 U.S. 727 (1878), over the objection that it violated the First Amendment. Still, the Act was widely viewed as an ineffective weapon against lotteries. Among other inadequacies,[5] the Attorney General concluded that the 1876 Act did not to apply to newspapers, even if they contained lottery advertisements.[6] Yet newspaper advertisements were often used to promote lottery sales, since newspapers enjoyed second-class mailing privileges and therefore were less expensive to distribute than letters containing lottery circulars.[7]

That shortcoming made the Act particularly ineffective against the powerful "Louisiana Lottery," the only legal lottery still operating in 1890 when the predecessor to the statute at issue in this case was passed.[8] The Louisiana

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[4] See *Horner* v. *United States*, 147 U.S. 449, 456, 466 (1893); 4 Cong. Rec. 3656 (1876) (Rep. Cannon); *Lottery Circulars*, 15 Op. Att'y Gen. 203, 203-204 (1877).

[5] One shortcoming in the Act was that the Postmaster General lacked the authority to seize letters that he suspected of containing lottery advertisments. *Lotteries*, 16 Op. Att'y Gen. 5 (1878).

[6] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885). The Attorney General concluded that a newspaper did not become a "circular" by publishing an advertisement. *Id.* at 309.

[7] See 21 Cong. Rec. 8714 (1890) (Rep. Evans).

[8] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881) (emphasis in original) (the Louisiana Lottery "is the *only* lottery conducted under the sanction of law in the United States"); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries); H.R. Rep. 2678, 49th Cong., 1st Sess. 2-3 (1886) (same); S. Rep. 11, 49th Cong. 1st Sess. 1-11 (1886) (same); H.R. Rep. 787, 50th Cong., 1st Sess. Pt. 2, at 1-2 (Views of the Minority) (1888).

Lottery operated nationwide and used the mails as its principal means of obtaining revenues from the public in other states,[9] deriving more than 90% of its revenue from out-of-state bettors.[10] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers, however, that Act did not hamper the Louisiana Lottery from soliciting customers through newspaper advertising.

After several years of debate,[11] Congress remedied that shortcoming by adopting the Anti-Lottery Act of 1890,

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[9] *Use of the Mails for Lottery Purposes,* H.R. Exec. Doc. 22, 46th Cong., 2d Sess. 16 (1880) (Letter from the Postmaster-General Key to the House of Representatives) ("[t]he lottery company most extensively using the mails for the transmission of its circulars, tickets, & c., is the Louisiana State Lottery"); *id.* at 27-28 (Letter from New York City Post Office General Superintendent Forrester to New York City Postmaster James (Oct. 14, 1879)); *id.* at 28-29 (Letter from New Orleans Postmaster McMillen to Assistant Attorney General Freeman, Post Office Dep't (Nov. 4, 1879)); Letter from New Orleans Postmaster McMillen to Postmaster-General Key (Nov. 12, 1879)); J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897,* H.R. Misc. Doc. 210, 53d Cong., 2d Sess. Pt. 9, at 80-81 (Special Message to Congress from President Harrison (July 29, 1890) (noting that it would be "practically impossible" for lotteries to survive if the mails were closed to them); 21 Cong. Rec. 8706 (1890); *id.* at 8711 (statement of Rep. Wilkinson); *id.* at 8717 (statement of Rep. Hitt); *id.* at 8721 (statement of Rep. Price); J. Ezell, *supra,* at 251; *The Development of the Law of Gambling* 673-677; Blakey & Kurland, *supra,* 63 Cornell L. Rev. at 935-936.

[10] 21 Cong. Rec. 8706 (1890) (statement of Rep. Moore that the Louisiana lottery derived 93% of its income from out-of-state bettors); J. Ezell, *supra,* at 251.

[11] See S. Rep. 233, 48th Cong., 1st Sess. (1884); *id.* at 12-15 (Views of the Minority); H.R. Rep. 826, 48th Cong., 1st Sess. (1884); S. Rep. 11, 49th Cong., 1st Sess. (1886); H.R. Rep. 2678, 49th Cong., 1st Sess. (1886); *id.* at 4-6 (Views of the Minority); H.R. Rep. 787, 50th Cong., 1st Sess. (1888); *id.* Pt. 2, at 1-4 (Views of the Minority); S. Rep. 1579, 51st Cong., 1st Sess. (1890); *id.* at 1-4 (reprinting House

ch. 908, 26 Stat. 465 (1890 Act), the direct predecessor to the statute at issue in this case. In order to deny lotteries the use of the mails to attract customers, the Act outlawed the mailing of "any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing." The constitutionality of the new Act was challenged in *In re Rapier,* 143 U.S. 110 (1892), and this Court again upheld the statute over a First Amendment objection. Although the Louisiana Lottery closed up its business in that state in 1893,[12] the lottery set up new headquarters in Honduras and used a Florida address for communications.[13] When Congress realized that the Louisiana Lottery had not yet been finally shut down, it passed the Act of Mar. 2, 1895, ch. 191, 28 Stat. 963, which made it a crime to import or transport lottery tickets in foreign or interstate commerce.[14] The constitutionality of that Act was also challenged, and this Court once again upheld it in *Champion* v. *Ames (Lottery Case),* 188 U.S. 321 (1903), this time over the claim that the Act exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

Report); see generally J. Ezell, *supra,* at 251-263; *The Development of the Law of Gambling* 513-518; Blakey & Kurland, *supra,* 63 Cornell L. Rev. at 937-940.

[12] Some contemporary commentators have concluded that the Anti-Lottery Act of 1890 was instrumental in bringing about the demise of the Louisiana Lottery. J. Ezell, *supra,* at 263-264; Blakey & Kurland, *supra,* 63 Cornell L. Rev. at 940.

[13] J. Ezell, *supra,* at 267-268.

[14] *Id.* at 268-269.

3. The prohibition on the mailing of publications containing lottery advertisements or prize lists enacted as the Anti-Lottery Act of 1890 survives, with minor amendments not relevant here,[15] as 18 U.S.C. 1302 para. 5. In relevant part, that provision makes it a crime knowingly to mail "[a]ny newspaper, circular, pamphlet, or publication of any kind" containing "any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance," or "any list of the prizes drawn or awarded" by means of any such lottery or similar enterprise. Section 1302 does not apply, however, to advertisements for a state-conducted lottery contained in a newspaper published in that state, or in an adjacent state that also has a state-conducted lottery. 18 U.S.C. 1307.[16]

Under complementary provisions of the Postal Code, any material that is excluded from the mail under 18 U.S.C. 1302 is deemed to be "nonmailable" and subject to seizure. 39 U.S.C. 3001. The Postal Service may refuse to deliver lottery-related responses for, or permit the payment of money orders to, a person conducting a lottery. 39 U.S.C. 3005. After an administrative proceeding, the

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[15] Act of Mar. 2, 1895, ch. 191, 28 Stat. 963; Act of Mar. 4, 1909, ch. 321, § 213, 35 Stat. 1129-1130; Act of June 25, 1948, ch. 645, § 1302, 62 Stat. 762; Act of Oct. 31, 1951, ch. 655, § 29, 65 Stat. 721; Act of Sept. 13, 1961, Pub. L. No. 87-218, § 2, 75 Stat. 492.

[16] Related provisions of Title 18 include: Section 1301, which prohibits the importation or interstate transportation of lottery tickets, advertisements, or lists of prizes; Section 1303, which prohibits any Postal Service officer or employee from acting as a lottery agent; Section 1304, which prohibits broadcasters from broadcasting lottery advertisements; Section 1305, which creates a special exemption for fishing contests; and Section 1306, which prohibits financial institutions from selling lottery tickets for state-operated lotteries.

Postal Service may return to a sender mail, appropriately marked as in violation of Section 3005, addressed to any person engaged in a lottery or a scheme involving fraud or false representations. 39 U.S.C. 3005. And under 39 U.S.C. 3007, the Postal Service may sue in federal court and, on a showing of probable cause, obtain a preliminary injunction detaining lottery-related incoming mail to a person alleged to be engaged in a lottery or similar scheme, pending the conclusion of those administrative proceedings.

B. Proceedings Below

Appellee Minnesota Newspaper Association, Inc., is an organization of general and special interest newspapers published in Minnesota. Minnesota law allows non-profit charitable organizations to operate gaming activities for fund-raising purposes. App., *infra,* 1a-2a. Appellee claimed that its member newspapers distributed a significant portion of their circulation through the mails and that its members wanted to publish advertisements and news stories about these lotteries, but were afraid to do so because of uncertainty about the meaning of 18 U.S.C. 1302 and 39 U.S.C. 3001 and 3005, and because of warnings they had received from local postal inspectors to the effect that that they could be prosecuted for mailing such materials. App., *infra,* 3a. Appellee therefore brought this action in the United States District Court for the District of Minnesota, challenging the constitutionality of those statutes under the First Amendment and the Due Process Clause.

On cross-motions for summary judgment, the district court granted partial summary in favor of each party. The court held that the statutes were constitutional insofar as they applied to lottery advertisements, but that they

violated the First Amendment to the extent that they restricted the mailing of lists of lottery winners. App., *infra*, 4a-20a.

The district court first held that lottery advertisements (including advertisements containing prize lists) fell squarely within the definition of "commercial speech," and that the restrictions imposed by 18 U.S.C. 1302 on mailing such advertisements met the standards for the regulation of commercial speech set forth by this Court in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980), and *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, No. 84-1903 (July 1, 1986). App., *infra*, 7a-13a. Although the advertisements that appellee's member newspapers sought to publish concerned lawful activity that was not inherently misleading (*id.* at 8a), the court found that the statutory restrictions were valid because they advanced two substantial governmental interests: Congress's interest in preserving the states' power to prohibit or limit gambling within their borders, and Congress's interest in restricting the interstate growth of private lotteries and reducing the threat of organized criminal involvement in gambling activity. *Id.* at 8a-11a. Both interests, the court held, were directly advanced by Section 1302 in a manner no more extensive than is necessary. App., *infra*, 11a-13a.

The court also concluded that the statute should not be construed to extend to general news reports or editorial comment concerning lotteries. Those materials, the court held, can be distributed through the mails. App., *infra*, 16a.

Notwithstanding its conclusion that the statute does not extend to news stories and editorial commentary, the district court nevertheless concluded that the prize list clause was unconstitutional. App., *infra*, 13a-15a. The court recognized that a list of prize winners is an effective promotional device for a lottery, but ruled that such a list

does not amount to commercial speech unless it is found in an advertisement. *Id.* at 13a-14a. Because Section 1302 independently prohibits the mailing of advertisements promoting lotteries, the court concluded that the prize list clause was designed to restrict the publication of prize lists in noncommercial speech (App., *infra,* 14a), and therefore was invalid unless the restriction was narrowly tailored to serve a compelling governmental interest. *Ibid.* Finding that the interests promoted by Section 1302 were not compelling, the court held the prize list clause was unconstitutional, but could be severed from the remainder of the statute. App., *infra,* 14a-15a, 16a. The court acknowledged that its holding was inconsistent with this Court's decision in *In re Rapier, supra,* but it concluded that the rationale of that ruling had been superseded by this Court's more recent First Amendment decisions. App., *infra,* 15a.

The district court accordingly entered a judgment declaring, inter alia, that "the restrictions in 18 U.S.C. § 1302, and its implementing regulations, on the mailing of lists of prizes awarded from a lottery are unconstitutional" and permanently enjoined appellants "from further enforcement of the restrictions on prize lists." App., *infra,* 20a; *id.* at 21a-22a.[17]

THE QUESTION IS SUBSTANTIAL

Private organzations sometimes conduct lotteries to raise revenues. There is a longstanding federal policy

[17] The court also rejected appellee's equal protection challenge to the advertising restriction of 18 U.S.C. 1302, on the ground that the distinctions complained of were rationally related to legitimate governmental interests. App., *infra,* 17a-19a. Finally, the court ruled that 39 U.S.C. 3001 and 3005 could not be applied to restrict the mailing of newspapers containing prize lists in news reports. App., *infra,* 19a.

against the use of the mails to promote such lotteries, whether or not they are legal under state law. Thus, it is illegal to import tickets for such lotteries in foreign commerce, or to distribute such tickets in interstate commerce or through the mails, 18 U.S.C. 1301 and 1302, or to distribute through the mails publications that contain advertisements about such lotteries or lists of the prizes they award. 18 U.S.C. 1302. The constitutionality of this regulatory scheme had been upheld by this Court on three separate occasions: the Court twice rejected First Amendment challenges to the predecessor versions of Section 1302 in *Ex parte Jackson*, 96 U.S. 727 (1878), and *In re Rapier*, 143 U.S. 110 (1892), and rejected a Commerce Clause challenge to the predecessor to Section 1301 in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903).

In this case, the district court upheld over a First Amendment challenge the clause forbidding the distribution through the mails of publications containing lottery advertisements, but held unconstitutional the parallel clause in that section prohibiting the mailing of publications containing lists of prizes awarded by lotteries. The district court ruled that the prize list clause was unconstitutional because it could be used to restrict the distribution through the mails of news reports about lotteries. The district court, however, misinterpreted the prize list clause, which complements the advertisement clause. Properly construed, the ban on the mailing of publications containing lottery prize lists is valid for the same reasons given by the district court for upholding the ban on the mailing of publications containing lottery advertisements.

1. a. The district court noted that Section 1302 contains separate clauses prohibiting the mailing of lottery advertisements and the mailing of lists of prizes awarded in a lottery. The court concluded that the advertisement

clause was directed at commercial speech, and that the constitutionality of that clause must be examined under the reduced standard of protection that is appropriate for commercial speech. See, *e.g.*, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, No. 84-1903 (July 1, 1986); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980); *Friedman* v. *Rogers*, 440 U.S. 1 (1979); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). But the district court also reasoned that, because a prize list contained in an advertisement would be independently covered by the advertisement clause, the prize list clause must have been designed to apply to something other than commercial speech. App., *infra*, 13a-14a. Accordingly, the court concluded that the prize list clause, unlike the advertisement clause, had to be measured against the higher standard of review appropriate for noncommercial speech.

The fatal flaw in the district court's reasoning is its unstated assumption that commercial speech is exactly coterminous with advertising, and that a statutory provision directed at a particular type of speech intended to promote the success of a lottery can be considered commercial speech only if it is contained in an advertisement. But this Court has never equated commercial speech with advertising. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66-68 (1983). Instead, the Court has consistently identified "the core notion of commercial speech" (*id.* at 66) as those forms of expression that do "no more than propose a commercial transaction" (*Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)), or that are "related solely to the economic interests of the speaker and its audience" (*Central Hudson*, 447 U.S. at 561). An advertisement that "communicate[s] information, expresse[s] opinion,

recite[s] grievances, protest[s] claimed abuses, and [seeks] financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964)) clearly would not be regarded as commercial speech. Equally clearly, certain types of expression not ordinarily described as advertising but integrally related to a commercial transaction—such as a proposed contract—would have to be regarded as commercial speech. The key elements of commercial speech, therefore, are its subject matter (whether it relates to an ordinary commercial transaction) and the relationship of the speaker to the transaction (whether the speaker has direct financial interest in the transaction or in the promotion of the transaction), not whether the speech is formally denominated as "advertising."

For example, under this Court's decisions a newspaper could publish news stories or editorials about lotteries, their prizes, or their participants, and those forms of discourse would clearly not be regarded as commercial speech. In our view, moreover, if a newspaper published a list of winning lottery numbers because it believed that the list or the numbers themselves were newsworthy, that too should not be considered as commercial speech, even if the newspaper published the list because it hoped to increase its circulation and thereby increase its revenues. But if the newspaper published a list of prizes because it expected to receive a share of a lottery's proceeds, or because it had sponsored the lottery itself, such a list in our view *would* amount to commercial speech, because it would be speech directly related to a commercial transaction in which the newspaper has a financial interest. Similarly, if the newspaper were paid to publish a list of prizes, such a list should be regarded as commercial speech, because it would

be speech about a commercial transaction that the newspaper had been directly paid to promote.

The district court was therefore in error in concluding that a statute that regulates something other than advertising cannot be regarded as a regulation of commercial speech. The prize list clause of Section 1302 can and should be construed to apply only to a form of commercial speech—*i.e.*, the publication of lists of lottery prizes by one who has a direct financial interest in a lottery or in its promotion—and not to other forms of discourse about lotteries, such as editorials or news stories. So construed, that clause is a lawful restriction on commercial speech promoting lotteries.

b. This construction of Section 1302 is supported by the language of the statute. As the district court recognized (App., *infra*, 16a), Section 1302 does not list news reports among the items to which the statute applies, and its structure shows that it was not designed to exclude from the mails documentaries, news stories, or editorials about lotteries. It applies to "[a]ny newspaper, circular, pamphlet, or publication of any kind," and therefore is sufficiently broad to include various promotional materials that contain nothing resembling a news story.[18] The all-inclusive scope of the statute suggests that the prize

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[18] The text of the Anti-Lottery Act of 1890 made the same point. As adopted, the first clause of that Act applied to any "letter, postal-card, or circular concerning any lottery" and any "list of the drawings at any lottery." The second clause referred to "any newspaper, circular, pamphlet, or publication of any kind containing any advertisment of any lottery * * * or containing any list of prizes awarded at the drawings of any such lottery." § 1, 26 Stat. 465 (Rev. Stat. § 3894 (Supp. 2d ed. 1874-1891)). That section included prize lists that were found in all types of mailed matter, including the types of promotional materials that would be generally distributed by the sponsors of a lottery, or that would be sent to an individual in response to an inquiry about a lottery's prizes.

list clause was not designed to zero in on news reports or editorials about lotteries. The most likely reason Congress included a separate prize list clause was to ensure that the Act would apply to circulars or other promotional materials distributed by the sponsor of a lottery that would not be regarded as either an advertisement or a legitimate news story.[19]

Moreover, the fact that Section 1302 lists lottery advertisements and prize lists in tandem strongly suggests that these clauses should be read in a complementary manner. See, *e.g.*, *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 322 (1977); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).[20] Lotteries, like other forms of gambling, often use prize lists for the same purpose as advertisements: in order to attract participants. By identifying the prizes that will be (or have been) awarded in a lottery, a prize list can promote future sales of lottery tickets. A prize list can also serve as a device for notifying winners, a function essential to the conduct of a lottery. The prize list clause should therefore be read as applying to the same conduct as the

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[19] Some lottery sponsors may not have included a list of their prizes in every circular. For example, in 1880 the Postmaster General reported that the National Banking Company issued bonds on the drawings of the Louisiana, Havana, and Kentucky lotteries, and that one of its circulars said: "Circulars containing list of securities dealt in, with full and explicit information, sent free." *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. 22, *supra*, at 9.

[20] "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. at 307. This maxim stated a "familiar" rule that was "applicable to all written instruments" in 1893. *Virginia* v. *Tennessee*, 148 U.S. at 519. It is therefore reasonable to assume that Congress was aware of that rule when Congress adopted the Anti-Lottery Act of 1890 and to interpret Section 1302 with that rule in mind.

advertisement clause, *i.e.*, to the use of the mails to promote a lottery by one who has a direct financial interest either in the lottery or in its promotion.

c. To be sure, if read expansively and without regard for the purpose Congress had in mind when it enacted the Anti-Lottery Act of 1890, the text of the prize list clause could be read to apply to editorial comment, documentaries, or other forms of discourse about lotteries, their participants, and their winnings. That construction of the statute would raise the type of serious First Amendment questions discussed by the district court. That court concluded that Section 1302 does not apply to those forms of discourse, however, and we agree with that ruling.

Congress did not adopt the Anti-Lottery Act of 1890 in order to deprive newspapers of the use of the mails for publishing news commentary about lotteries.[21] Rather,

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[21] There was considerable debate in Congress on the question whether the Anti-Lottery Act of 1890 would violate the First Amendment. Supporters of the Act argued that it was constitutional under this Court's decision in *Ex parte Jackson, supra*. See S. Rep. 233, 48th Cong., 1st Sess. 1 (1884); S. Rep. 11, 49th Cong., 1st Sess. 12 (1886); H.R. Rep. 2678, 49th Cong., 1st Sess. 1 (1886); H.R. Rep. 787, *supra*, Pt. 2, at 2-4 (Views of the Minority); 21 Cong. Rec. 8710 (1890) (Rep. Caldwell); *id.* at 8712 (Rep. Wilkinson). Opponents of the bill argued that *Ex parte Jackson* did not sanction the exclusion of newspapers from the mails, and that, if enacted, the Act would serve as a precedent for the exclusion from the mails of other types of commentary that future Congresses would find detrimental to the public. See S. Rep. 233, *supra*, at 13-15 (Views of the Minority); H.R. Rep. 826, 48th Cong., 1st Sess. 2-4 (1884); H.R. Rep. 2678, *supra*, at 4-6 (Views of the Minority); H.R. Rep. 787, *supra*, at 1. The Fifty-First Congress ultimately concluded that it was lawful to exclude newspapers containing lottery advertising from the mails. As Representative Wilkinson explained (21 Cong. Rec. 8712 (1890)):

> It is said also that this is a blow at the freedom of the press, which, with freedom of speech, Congress is forbidden by the first amendment to the Constitution to make any abridgement of.
>
> Sir, if this is a blow against the freedom of the press it is such a blow as the State of New York has struck where lottery advertise-

newspapers were listed in the Act because they were a relatively inexpensive way for a lottery to distribute advertisements and because the Attorney General had concluded that the existing law did not cover newspapers that published lottery advertisements. Congress therefore exercised its power under the Postal Clause, Art. I, § 8, Cl. 7, in order to deprive lotteries of the use of the mails to conduct or promote their games. In fact, by 1890 the Louisiana Lottery was the only lottery still operating legally, and it derived more than 90% of its revenue from out-of-state bettors. *It* was the target of the Anti-Lottery Act of 1890, not newspapers.[22] Congress concluded that the only effective way to suppress the Louisiana Lottery – to "cut [it] down to a mere local gambling establishment, answer-

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ments are forbidden in the newspapers. It is such a blow as other States in this Union have struck who have done likewise, but I have never yet heard it has there been considered a blow at the freedom of the press. The freedom of the press, as I understand it, consists in the right of the editors of the newspapers to freely express their views on public questions without let or hinderance by those in authority. It means to forbid that censorship of the press once so prevalent in European countries and still common in those countries, but this matter of advertisements seems to me to be a different affair. I hold in my hand as good a paper, as well supplied with news, as interesting as paper to read, perhaps, as any in the United States, a paper which is published in a State where lottery advertisements are forbidden and where no newspaper dares to print one, and it seems to thrive and prosper and makes no complaint that its rights have been interfered with.

[22] That is clear from the numerous references to the Louisiana Lottery during the consideration of the Anti-Lottery Act of 1890. See *Message from the President of the United States,* S. Exec. Doc. 196, 51st Cong., 1st Sess. 1 (1890); 21 Cong. Rec. 8699 (1890) (Rep. Hopkins); *id.* at 8705 (Rep. Moore); *id.* at 8707 (Rep. Hopkins); *id.* at 8707-8708 (Rep. Rogers); *id.* at 8708 (Rep. Hill); *id.* at 8711-8713 (Rep. Wilkinson); *id.* at 8713 (Rep. Evans); *id.* at 8719 (Rep. Hansbrough); *ibid.* (Rep. Blount).

able to the police powers of the local government" (21 Cong. Rec. 8717 (1890) (Rep. Hitt))—was to exclude from the mails newspapers and the other publications that contained its advertisements and related promotional materials and thereby deny the lottery access to its primary source of income.

The references in Section 1302 to "any advertisement of any lottery" and to "any list of the prizes drawn or awarded by means of any such lottery" should be interpreted in light of this overriding purpose. The materials that were the focus of Congress's concern were what would today clearly be called commercial speech. Interpreting Section 1302 to apply only to commercial speech is thus not "plainly contrary to the intent of Congress" (*DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, No. 86-1461 (Apr. 20, 1988), slip op. 6), and avoids the constitutional issues raised by the district court's interpretation of the Act. *Ibid.*; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501 (1979); *United States* v. *12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973).[23] The prize list clause, like the advertisement clause, should be read as a restriction on commercial speech.

2. When read in the manner suggested above, the prize list clause in Section 1302 is valid for the same reasons given by the district court for upholding the advertisement clause in the same section: the prize list clause, like the advertisement clause, applies to a form of commercial speech, and the statutory scheme satisfies the standards

[23] In the *12 200-Ft. Reels of Film* case, for example, the Court said (413 U.S. at 130 n.7) that it would construe the term "obscene" in the federal laws prohibiting the importation of obscene material in a manner consistent with the definition of obscenity adopted in *Miller* v. *California*, 413 U.S. 15 (1973). A similar analysis is appropriate here.

for the regulation of commercial speech set forth in *Central Hudson* and *Posadas.*[24]

Section 1302 reasonably advances several legitimate governmental interests. The statute applies to both legal and illegal lotteries. *Horner* v. *United States,* 147 U.S. 449, 456, 466 (1893). To the extent that it reaches lotteries that are illegal under federal or state law, the statute is clearly valid, because the government may regulate or ban entirely speech proposing an illegal transaction. *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 496 (1982); *Central Hudson,* 447 U.S. at 563-564; *Pittsburgh Press,* 413 U.S. at 388. Section 1302 also may be constitutionally applied to advertisements and associated promotional material about lawful gambling activities. As the district court explained in connection with the advertisement restrictions, Section 1302 safeguards the policies of those states that have prohibited lotteries.[25] Moreover, by restricting the growth of private

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[24] The United States District Court for the District of Columbia also recently upheld the constitutionality of the advertisement clause in Section 1302 over a similar First Amendment objection. *Aimes Publications, Inc.* v. *United States Postal Service,* No. 86-1434 (D.D.C. Feb. 23, 1988), appeal pending (D.C. Cir.).

[25] Of course, the prohibition adversely affects the policies of those states that have authorized private lotteries. See *The Lottery Advertising Clarification Act: Hearings on H.R. 1568 Before the Subcomm. on Administrative Laws and Governmental Regulations of the House Comm. on the Judiciary,* 100th Cong., 1st Sess. 13-14, 20-22 (1987) (testimony of Deputy Assistant Attorney General Kmiec). When the Anti-Lottery Act was enacted in 1890, however, that matter was of little or no concern, because the Louisiana Lottery was then the only legal lottery still operating in the United States, and more than 90% of its income came from out-of-state. See pages 4-5, *supra.*

The House of Representatives is presently considering H.R. 3146, 100th Cong., 2d Sess. (1988), known as the Lottery-Advertising Clarification Act of 1988, which would expand the exemption in 18

lotteries, Section 1302 reduces the threat of organized criminal involvement in gambling activities. App., *infra*, 8a-11a. The statute therefore advances principles of federalism and protects the welfare of the citizens of those states that have declared that private lotteries are against public policy. Both goals are legitimate interests for Congress to advance through federal law. See *South Carolina* v. *Baker*, No. 94, Orig. (Apr. 20, 1988), slip op, 5-7; *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, slip op. 11-12; *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550-554 (1985). The mailing restrictions directly promote those interests, because the states lack authority to regulate the mails. App., *infra*, 12a. Finally, the mailing restrictions are not unduly burdensome. Publications, including newspapers, are not forbidden from publishing commercial lottery advertisements or lists of lottery prizes; they simply may not use the mails if they do so.

This Court's recent decision in *Posadas de Puerto Rico Assocs.* v. *Tourism Co., supra*, also supports the constitutionality of Section 1302. In that case, this Court upheld over a First Amendment challenge regulations limiting the commercial advertising of casino gambling to nonresidents of Puerto Rico, even though casino and other gambling acitivities were legal in that jurisdiction. The Court found that Puerto Rico had a legitimate interest in restricting commercial gambling advertising in order to safeguard the moral well-being of its citizens, and to prevent both corruption and the infiltration of organized

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U.S.C. 1307 to include materials promoting a lottery that is "authorized or not otherwise prohibited by law in the State in which it is conducted." H.R. Rep. 100-557, 100th Cong., 2d Sess. Pt. 1, at 1 (1988); see 134 Cong. Rec. H3073-H3079, H3102-H3103 (daily ed. May 10, 1988).

crime. Slip op. 11-12. Moreover, the Court ruled that restricting commercial advertising was a reasonable means of advancing those interests, because the goverment could reasonably believe that commercial casino advertising would enhance the demand for casino gambling. *Id.* at 12. The regulations were also tailored to Puerto Rico's interest in protecting the welfare of its citizens. *Id.* at 14-15. Finally, the Court held that, because Puerto Rico could ban gambling altogether, Puerto Rico could instead take the less restrictive step of restricting commercial advertising about that activity. *Id.* at 16.

The same analysis is appropriate here. Participating in a lottery, like any other form of gambling, is not a constitutionally protected activity. The federal government and the states can prohibit that activity entirely. *E.g., Posadas,* slip op. 16; *Champion* v. *Ames (Lottery Case),* 188 U.S. at 356-358; *In re Rapier,* 143 U.S. at 134; *Stone* v. *Mississippi,* 101 U.S. 814, 821 (1879). For much of our history, the states did just that. Section 1302 therefore reasonably and directly promotes the type of interests that this Court found legitimate in *Posadas.* The district court's decision to invalidate the prize list clause in its entirety erroneously denies Congress the authority to bar from the mails a narrow category of commercial speech that plays a direct and integral role in the conduct of an activity that Congress and the states are entitled to discourage or suppress.

3. The district court's permanent injunction against further enforcement of the prize list clause also conflicts with this Court's decisions in *Ex parte Jackson, supra,* and *In re Rapier, supra.* In *Ex parte Jackson,* the Court held that a person could be prosecuted under the Act of July 12, 1876, for depositing in the mails a letter containing a circular offering prizes in a lottery. In so ruling, the Court rejected a claim that the Act violated the First Amendment, holding that "the object of Congress has not been to

interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." 96 U.S. at 736. Similarly, the Court upheld the Anti-Lottery Act of 1890 over a First Amendment claim in *In re Rapier, supra.* In that case, two defendants were convicted for sending through the mails a newspaper containing an advertisement and a circular about the Louisiana Lottery. Relying on *Ex parte Jackson, supra,* the Court rejected the claim that the Act violated the First Amendment, concluding that "[t]he circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people." *In re Rapier,* 143 U.S. at 134. Accord *Horner* v. *United States (No. 1),* 143 U.S. 207, 213 (1892); *Horner* v. *United States (No. 2),* 143 U.S. 570, 578 (1892) (relying on *In re Rapier).* The district court's ruling directly conflicts with this Court's decisions in the *Rapier* and *Jackson* cases. In fact, the district court acknowledged that its ruling was inconsistent with *Rapier.* App., *infra,* 15a.

Moreover, in cases decided after *Jackson* and *Rapier* that involved schemes to defraud the public, the Court has upheld the constitutionality of two related statutes that also date from the era of the Anti-Lottery Act of 1890: 39 U.S.C. 3005 and 3007, which authorize the Postal Service to initiate administrative and judicial proceedings in order to intercept reply mail induced by a fraudulent scheme. *Public Clearing House* v. *Coyne,* 194 U.S. 497, 505-516 (1904) (relying on *In re Rapier); Donaldson* v. *Read Magazine,* 333 U.S. 178, 189-191 (1948) (relying on *Coyne*); *Lynch* v. *Blount,* 404 U.S. 1007 (1972), aff'g 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court) (39 U.S.C. 3005); *Outpost Dev. Corp.* v. *United States,* 414 U.S. 1105, aff'g 369 F. Supp. 399 (C.D. Cal. 1973) (three-

judge court) (39 U.S.C. 3005, 3007). The Third, Fifth, and Ninth Circuits have also upheld the constitutionality of this enforcement mechanism. *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d 362 (5th Cir. Unit B 1981), cert. denied, 456 U.S. 915 (1982) (both sections); *United States Postal Service* v. *Beamish*, 466 F.2d 804, 806-807 (3d Cir. 1972) (Section 3007); *Hollywood House Int'l, Inc.* v. *Klassen*, 508 F.2d 1276 (9th Cir. 1974) (Section 3005). See also *Original Cosmetics Products, Inc.* v. *Strachan*, 459 F. Supp. 496 (S.D.N.Y. 1978), aff'd, 603 F.2d 214 (2d Cir.) (Table), cert. denied, 444 U.S. 915 (1979) (Section 3005). As the Fifth Circuit explained in 1981, the Court's recent commercial speech decisions do not undermine the validity of these statutory provisions. *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d at 366-368.[26] Sections 3005 and 3007 also apply

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[26] The decision below is also inconsistent with the decisions of the Second and Third Circuits with respect to the constitutionality of 18 U.S.C. 1304, which prohibits broadcasting information about lotteries. The Second Circuit in *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (1969), cert. denied, 396 U.S. 1061 (1970), upheld the constitutionality of the statute as applied to information directly promoting a state-conducted lottery. Although the Third Circuit in *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (1974) (en banc), dismissed as moot, 420 U.S. 371 (1975), held that Section 1304 would be unconstitutional if it were applied to prohibit the broadcasting of a winning lottery number in a lawful state-conducted lottery, the court held that the statute could constitutionally be applied to compensated broadcasts, and possibly to some uncompensated promotional advertisements beyond the context of broadcast journalism. 491 F.2d at 224. This Court granted certiorari to review the Third Circuit's decision, but later ordered the case dismissed as moot after Congress enacted 18 U.S.C. 1307, which exempts state-run lotteries from Section 1304. *United States* v. *New Jersey State Lottery Comm'n*, 420 U.S. 371 (1975).

The district court's ruling in this case invalidating the prize list clause in Section 1302 goes well beyond the decisions of the Second

to lotteries, and, for the reasons discussed above, the application of those statutes to commercial speech does not violate the First Amendment.

Given this extensive contrary authority, the district court's judgment invalidating in its entirety the prize list clause clearly presents a substantial federal question that should be resolved by this Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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and Third Circuits. The district court determined that the prize list clause in Section 1302 is invalid because it applies to such lists reported in news stories, but the judgment entered by the district court invalidated the prize list clause in its entirely. App., *infra*, 21a-22a. Under the district court's judgment, the Postmaster could not apply the prize list clause to any type of publication, including circulars prepared and disseminated by the sponsors of an illegal numbers racket. Both the Second and Third Circuit decisions noted above, however, would uphold Section 1302 if it was applied in that manner. The decision below therefore is also inconsistent with the decisions of the Second and Third Circuits in the lottery broadcasting cases.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF

v.

POSTMASTER GENERAL OF THE UNITED STATES, UNITED STATES POSTAL SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS

[December 31, 1987]

MEMORANDUM AND ORDER

This matter comes before the court on the parties' cross-motions for summary judgment. At issue is the constitutionality of certain federal statutes and postal regulations which criminalize the mailing of advertisements or prize lists for lotteries or similar enterprises. Plaintiff Minnesota Newspaper Association ("MNA") contends that the statutes, primarily 18 U.S.C. § 1302 (1982), violate the constitutional standards of free speech and press, and equal protection. Defendant Postmaster General contends that the statutes and related regulations satisfy the standards set out in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). For the reasons stated below, the court grants partial summary judgment for MNA and partial summary judgment for the Postmaster. The challenged statutes are constitutional with respect to advertisements. However, the Postmaster has failed to establish a compelling governmental interest justifying the content-based restrictions on the mailing of prize lists.

FACTS

Minnesota law allows, subject to extensive regulation, nonprofit charitable organizations to operate gaming ac-

tivities for fund raising purposes. Minn. Stat. §§ 349.11-.60 (1986 & Supp. 1987). The primary games are bingo, pull tabs, raffles, paddle wheels, and tip boards. These organizations are free to use any form of advertising which does not involve mailing or broadcast.[1]

Plaintiff MNA is the chief representative of the organized newspaper press in Minnesota. MNA's member newspapers distribute a significant portion of their circulation through the United States mails. This dependence on the mails has forced newspapers to reject advertisements from charitable and nonprofit organizations wishing to publicize gaming activities. Such advertisements would run afoul of the restrictions contained in 18 U.S.C. § 1302[2] and 39 U.S.C. §§ 3001[3] and 3005[4].

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[1] 18 U.S.C. § 1304, which is not at issue here, prohibits the broadcast of advertisements or information concerning lotteries or similar enterprises.

[2] 18 U.S.C. § 1302 provides in relevant part:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> . . . .
>
> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot of chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;
>
> . . . .
>
> Shall be fined no more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

[3] 39 U.S.C. § 3001 provides in relevant part:

> (a) Matter the deposit of which in the mails is punishable under section 1302 . . . of Title 18 . . . . is nonmailable.

[4] 39 U.S.C. § 3005 provides in relevant part:

> (a) Upon evidence satisfactory to the Postal Service, that any

Newspapers have also withheld news reports on bingo games and similar lottery operations legally conducted in Minnesota by private organizations because of the confusion that surrounds the interpretation and application of these statutes. Some of MNA's members newspapers have published such advertisements or news reports, and have been threatened with sanctions by representatives of the Postal Service. The Postal Service has also asked MNA to notify its members that further publication would cause the Postal Service to take action against the offending newspapers.

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person . . . is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which –

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

(3) requires the person or his representative to cease and desist from engaging in any such . . . lottery, or gift enterprise.

(d) Nothing in this statute shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery . . . .

ANALYSIS

MNA seeks declaratory and injunctive relief. Its members newspapers face the very real threat of prosecution and/or the loss of mailing privileges. MNA itself was asked to warn its members of the serious potential for sanctions.

The Postmaster does not dispute MNA's standing to challenge the constitutionality of 18 U.S.C. § 1302 and 39 U.S.C. § 3001. However, the Postmaster does contend that MNA lacks standing to challenge the constitutionality of 39 U.S.C. § 3005. This section authorizes the issuance of "stop mail" orders against parties who use the mails to conduct a lottery or similar enterprise. The Postmaster argues that § 3005 applies only to those who actually conduct lotteries. Therefore, since MNA and its members do not conduct lotteries, MNA lacks standing to challenge this statute.

The court rejects the Postmaster's argument. Subsection (d) of section 3005 specifically excepts newspapers which carry advertisements or information concerning state-conducted lotteries from the prohibitions of this section. The exception proves the rule. By implication, newspapers which carry advertisements or information concerning *private* gaming operations may be subject to the sanctions of § 3005. Such advertising is precisely the conduct at issue in MNA's suit. Therefore, MNA has standing to challenge 39 U.S.C. § 3005.

A. Statutory Background

The criminal statute at issue, 18 U.S.C. § 1302, provides that whoever knowingly deposits in the mails, among other things, a newspaper containing any advertisement of

a lottery[5] or similar enterprise, or containing a prize list for such lottery or enterprise, is subject to a fine of up to $1,000 and/or imprisonment up to two years for the first offense and up to five years for any subsequent offense.

This prohibition originated in 1890 as an amendment to certain statutes relating to lotteries. 26 Stat. 465. *See also* Act of Mar. 4, 1909, Ch. 321, § 213, 35 Stat. 1129. The constitutionality of this section was upheld in *In re Rapier*, 143 U.S. 110 (1892). The Court based its decision on the authority of Congress to establish a postal system. U.S. Const. Art. 1, § 8, cl. 7. That authority includes the power to designate what may and may not be carried in the mails. *Id.* at 133.

Though the exercise of Congress' postal power through the legislation restricted lotteries, the Court did not "regard the right to operate a lottery as a fundamental right . . . ." *Id.* at 134. The Court also held that the legislation did not abridge the freedom of the press. "The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people." *Id.*

The Supreme Court has recently reiterated the broad scope of the Article I postal power. *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 126 (1981). "The power possessed by Congress embraces the regulation of the entire Postal System of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be

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[5] A lottery, gift enterprise, or similar scheme has three essential elements: (1) the distribution of prizes; (2) according to chance; (3) for consideration. *Federal Communication Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 290 (1954). For purposes of this opinion, the term "lottery" includes all games of chance for which the plaintiff's members may not mail advertisements or prize lists.

excluded." *Id.* (quoting *Ex parte Jackson*, 96 U.S. 727, 732 (1878)). However, the Court in *Greenburgh* noted that this power "may not . . . be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution." *Id.*

This court must determine whether, in light of the developments in constitutional, particularly First Amendment, jurisprudence over the past century, the statutes at issues impermissibly infringe on the rights of freedom of speech and of the press, or equal protection.

B. Freedom of Speech and Press

The definition of commercial speech is central to this analysis. 18 U.S.C. § 1302 prohibits the mailing of publications containing, first, advertisements of a lottery or similar enterprise, and, second, lists of prizes for a lottery or similar enterprise. The categorization, commercial or noncommercial speech, of advertisements or prize lists will determine the defendant's burden in justifying these restrictions.

Commercial speech is entitled to First Amendment protections, though less extensive than those afforded to noncommercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). If commercial, the Postmaster must satisfy the standards of *Central Hudson*, 447 U.S. 557. If noncommercial, the Postmaster faces the almost impossible task of justifying the restriction. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987).

The Eighth Circuit, in *Garner v. White*, 726 F.2d 1274 (8th Cir. 1984), defined commercial speech as "speech which does 'no more than propose a commercial transaction,' or that 'relate[s] solely to the economic interests of

the speaker and its audience.' " *Id.* at 1277 (citation omitted). The Seventh Circuit noted, in *Woods v. Evansville Press Co.*, 791 F.2d 480, 484 (7th Cir. 1986), that "the term 'commercial speech' has predominantly been used in the first amendment context to describe commercial advertising."

1. Advertisements

Most advertisements fall squarely within the definition of commercial speech. A vendor purchases publication space in order to propose a business transaction. The charitable organization which sponsors a lottery has a similar motive. It wants its audience to know that for a sufficent consideration and with a sufficient amount of luck, they may realize a more than sufficient return. The advertisement touches the economic interests of both speaker and audience.

The Supreme Court, in *Central Hudson*, established a four-step analysis for commercial speech. In order to receive First Amendment protection, the speech:

> at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, 447 U.S. at 566.

Under the *Central Hudson* test, then, the dissemination of truthful commercial information about a lawful activity can be restricted if it is misleading, or if the government has a substantial interest, directly advanced, and the restriction is not more extensive than necessary.

a. Lawful activity, not misleading

The advertising which MNA's members desire to publish would concern lawful gaming enterprises. The Postmaster contends, though, that such advertising is deceptive and misleading if it does not reveal the odds against winning. As such, it is not entitled to the protections of the commercial speech doctrine.

Such disclosure is not required in order to include lottery advertisements within the protections of *Central Hudson*. Long odds are inherent in lotteries, and the public knows that. These are, after all, games of chance. Because the speech is not inherently misleading, the government must satisfy the final three steps of *Central Hudson*.

b. Substantial governmental interest

The governmental interests advanced by the restrictions on lottery advertisements must be substantial. The Postmaster argues, first, that the restrictions protect the policies of nonlottery states. Those states which prohibit lotteries have made a policy choice to restrict participation in gaming activities. Within the borders of each of these states this is unquestionably a substantial interest. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,* 106 S. Ct. 2968, 2977 (1986) (legislature's interest in health, safety, and welfare of its citizens is substantial).

The issue then becomes whether Congress has a substantial interest in protecting those policies. Congress has an interest in exercising its postal power in a manner which allows individual states to make policy choices within the areas that have been reserved to the states. The regulation of lotteries traditionally has been left to the states. Because individual states have no authority to regulate the U.S.

mail,[6] nonlottery states would have no effective means to implement their gaming policy without the prohibitions at issue here. Removing these prohibitions would also undermine the policies of those states which have chosen to allow only limited types of gaming. This latter group of states would have no effective means to implement their limiting policy.

The Supreme Court, in upholding a statute which prohibited the interstate transport of lottery tickets, commented that Congress decided "that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce." *Champion v. Ames*, 188 U.S. 321, 357 (1903). *Accord United States v. Stuebben*, 799 F.2d 225, 229 (5th Cir. 1986).

In response, MNA contends that any federal concern for the policies of nonlottery states is decimated by the exception contained in 18 U.S.C. § 1307.[7] This section allows newspapers to carry advertisements, prize lists and information concerning a state-conducted lottery if the

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[6] *See United States Postal Serv. v. Brennan*, 574 F.2d 712, 714 (2d Cir. 1978) (only limits on postal power are those prescribed in the Constitution), *cert. denied*, 439 U.S. 115 (1979). *See also Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975) (state cannot prohibt local advertising of out of state services which are legal in the advertisers' state); and *State ex inf. Danforth v. Reader's Digest Ass'n, Inc.*, 527 S.W.2d 355 (Mo. 1975) (en banc) (state lottery statute does not interfere with federal postal power).

[7] 18 U.S.C. § 1307 provides in relevant part:

> (a) The provisions of section[] . . . 1302 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—
>
> (1) contained in a newspaper published in that State or an adjacent State which conducts such a lottery . . . .

newspaper is published in that state, or in adjacent state which also has a state-conducted lottery.

This is a narrow exception. The section is limited to advertisements for state-conducted lotteries and only in newspapers published within states conducting such lotteries. The exception does not affect newspapers in nonlottery states. The section is consistent with the congressional interest in refusing to use the postal power to undermine the policies of nonlottery states.

MNA also contends that the statutes make no distinction between lawful and unlawful lotteries. In other words, once a state permits private lotteries, Congress should be divested of authority to prohibit the mailing of advertising for those lotteries. The Supreme Court addressed a similar argument from a petitioner seeking to have his obscenity conviction overturned. The Court held that "the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails . . . to be used for the purpose of sending obscene material into the permissive State." *Smith v. United States*, 431 U.S. 291, 307 (1977). So, too, the state's right to permit private lotteries does not create a right to use the mails to advertise those lotteries.

The challenged restrictions on the mailing of lottery advertisements comport with the principles of federalism by allowing the individual states to advance their own gaming policies. The restrictions also protect the substantial interests of the states in protecting the health, safety, and welfare of their citizens.

The Postmaster also argues that the prohibitions further a second substantial interest: the government's interest in restricting the interstate growth of private lotteries and reducing the threat of criminal involvement. This was the

primary purpose behind the original legislation. The Louisiana Lottery had become so pervasive that only action at the federal level could deal with it. That concern remains relevant and substantial. "With no guarantee from the states that undesirable elements would not profit as licensees, the enactment of these provisions [permitting the mailing of private lottery advertisements] would lead to criminal involvement in gambling." H.R. Rep. No. 1517, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7007, 7022 (letter from Assistant Attorney General W. Vincent Rakestram).

MNA argues that the highly regulated nature of lottery activity in states like Minnesota makes the Postmaster's concern with criminal involvement insignificant. However, because regulation of these matters is left to the states, the experience of those states which exercise extensive regulatory control over lotteries is not instructive on what would happen in other states. Indeed, the removal of the mailing restrictions in section 1302 may lead some states to liberalize their lottery regulations in order to encourage commerce.

Other statutes also militate against the reemergence of interstate private lotteries. The prohibition on advertising in section 1302 serves as a necessary complement to the other statutory provisions designed to hamper the growth of these lotteries. The Postmaster has demonstrated a substantial governmental interest in reducing the threat of criminal involvement in gaming activities.

c. Directly advanced

The Postmaster, in the last two steps of the *Central Hudson* analysis, must prove that Congress has chosen an appropriate means to accomplish the asserted interest. *Central Hudson*, 447 U.S. at 566. The challenged restric-

tions must directly advance that interest, and the restrictions can be no more extensive than necessary to serve that interest.

The prohibition on advertising keeps mailed advertising, which the states cannot regulate, out of those states which have determined that lotteries must be banned or highly regulated. The prohibitions directly advance the federal government's interest in protecting the policy choices of the individual states.

The restrictions also directly advance the government's interest in preventing the interstate growth of private lotteries. Advertising of private lotteries increases participation. If this were not so, the plaintiff would not be challenging these statutes because there would be no demand from lottery sponsors for newspaper advertising. Effective suppression of interstate private lotteries requires suppression of the advertising which would make such lotteries possible.

The plaintiff contends that the restrictions are ineffective because lottery sponsor shift their advertising to media which are not so restricted. One way or another, information on gaming opportunities reaches the public. This argument misses the point that the government's interest is not in squelching all lottery advertising, but in keeping that advertising, as much as possible, within the state of origin.

d. No more extensive than necessary

The court is also satisfied that the restrictions on advertising are no more extensive than necessary to serve the government's interest. MNA suggests that the government has several less restrictive options, notably disclaimers within the advertisement, and public education campaigns.

Counterspeech was not in vogue when the statutes at issue were enacted. However, the more recent experience with disclaimers in cigarette advertisements supports the conclusion that disclaimers and public service campaigns, while less extensive, would not effectively advance the stated interests.

The Supreme Court, addressing this argument in its *Posadas* decision, concluded that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Posadas*, 106 S. Ct. at 2978.

In summary, the court concludes that the restriction on advertisements in 18 U.S.C. § 1302 passes the *Central Hudson* test.

2. Prize lists

Lists of prizes awarded, which are also prohibited by 18 U.S.C. § 1302, do not fit within the definition of commercial speech. Of course, a prize list contained within a lottery advertisement is commercial speech. A list of winners is an effective promotional device. A lottery sponsor would include such a list in order to encourage its audience to participate in a commercial transaction—the lottery.

However, a prize list also has value as news. In the context of a news report, a prize list is truthful information about a public event. It is as noteworthy as the score of a ball game or the review of a play. An editor's decision to publish the list of winners from last night's bingo game is not an offer by the newspaper to engage in a commercial transaction. It is simply news.

Prize lists have no inherent claim to First Amendment protection. It is the context of the prize list, in advertisement or news reports, that determines the level of protection.

The court has already concluded that the government may restrict lottery advertising, and that includes advertisements containing prize lists. However, section 1302 was intended to cover more than prize lists within lottery advertisements. Prize lists are set out in the statute as a separate prohibited category, not a subset of advertisements. The statute was designed to restrict the publication or prize lists in news reports. The restriction on prize lists, therefore, directly infringes on noncommercial speech.

Noncommercial speech is entitled to the full measure of First Amendment protections. In order to justify the prohibition on prize lists, the Postmaster must show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1728 (1978). As the Supreme Court noted in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983), "this Court has sustained content-based restrictions [or noncommercial speech] only in the most extraordinary circumstances."

The commercial speech doctrine affords a limited measure of protection to commercial speech, and, accordingly, "modes of regulation that might be impermissible in the realm of noncommercial expression" will be allowed with respect to commercial expression. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Section 1302, because it applies the same prohibition to both commercial and noncommercial expression, treats unequals equally. What the court has found to be the government's substantial interest with respect to advertisement must now be found to be a compelling interest with respect to prize lists.

The restriction on publishing prize lists acts as a restraint on the editorial decision making process. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly

and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Natl. Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)). The interests here asserted do not justify imposing the fear of subsequent punishment on an editor who decides to publish a lottery prize list. "The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . ." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The Postmaster has not established a compelling interest justifying the prohibition in 18 U.S.C. § 1302 on the mailing of prize lists. This section of the statute is, therefore, an impermissible infringement on First Amendment rights. The court need not reach the issue of whether the restriction is narrowly drawn.

This court's holding regarding prize lists is inconsistent with the Second Circuit's opinion in *New York State Broadcasters Ass'n v. United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). There the court held that the FCC could prohibit the broadcast of information directly promoting a lottery. *Id.* at 998. The court did not require the finding of a compelling interest to justify this content-based restriction. This is precisely the finding which this court was required to make, concluding that such an interest had not been proven.

This court's holding regarding prize lists is also inconsistent with the Supreme Court's decision in *In re Rapier*, 143 U.S. 110 (1892), which held that entire statute constitutional. However, First Amendment decisions such as *Near v. Minnesota*, 283 U.S. 697 (1931), and its progeny, direct courts to resist governmental interference with the news gathering function.

3. News reports and editorials

MNA has asserted that its member newspapers have withheld news coverage and editorial comment on lotteries because of the confusion that surrounds the interpretation and application of these prohibitions.

Because section 1302 is a penal statute, it must be strictly construed. *Federal Communication Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). The statute is, by its language, limited to advertisements and prize lists. It cannot be construed to extend to general news reports or editorial comment. Accordingly, this court holds that section 1302 does not authorize the exclusion from the mails of newspapers containing general news reports or editorial comment regarding lotteries.

4. Severability

The proper analysis to be followed in determining the issue of severability is well established. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476, 1480 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). A statute is presumed severable if what remains is fully operative as law.

The provisions of section 1302 apply to two items, advertisement and lists of prizes drawn. The court has held the prohibition affecting prize lists invalid. This holding in no way undermines the functioning of the prohibition on lottery advertisements. That segment remains fully operative. Therefore, the language of section 1302 covering prize lists is severed from the statute and the provisions dealing with advertisements remain in effect.

C. Equal Protection

MNA argues that the classification scheme embodied in section 1302 and related statutes is arbitrary, irrational, and violates the principles of equal protection. MNA contends that newspapers are not treated the same as those advertising media that do not use the mails or airwaves. MNA also asserts that the restrictions discriminate against smaller lottery sponsors which are least able to afford alternate forms of advertising.

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). MNA seems to be presenting two sets of similarly situated groups which are being treated differently. The first is advertising media. Newspapers, along with the broadcast media, because of their dependence on interstate commerce, are treated differently than other media. Second, MNA suggests that lottery sponsors are affected differently by the restrictions.

Before addressing these concerns, the court must determine the appropriate standard of review. MNA contends that strict scrutiny is proper because the statutes infringe on personal rights protected by the Constitution. The Fifth Circuit addressed this issue in *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), and concluded that strict scrutiny was not appropriate. "[P]arties cannot insist on strict scrutiny merely by asserting a First Amendment right that the court ultimately finds not to be violated." *Id.* at 752.

This court has held that the restrictions on lottery advertising (which, from the plaintiff's perspective, are the only prohibitions still at issue) are constitutional. Because the advertising restrictions in Section 1302 do not violate any fundamental rights, strict scrutiny is not the proper stand-

ard. Accordingly, the court must determine whether the statutes are rationally related to a legitimate state interest.

MNA contends, as noted above, that newspapers are treated differently than those media which do not use interstate commerce. This is a weak argument. Congress has been consistent in prohibiting advertising for lotteries in those media which it regulates – those using the means of interstate commerce. The tenets of equal protection are not violated because other media, beyond Congress' authority, are not similarly regulated. "[I]t is a reasonable ground of classification that a state has power to legislate with respect to persons in certain situations and not with respect to those in a different one." *Id.* at 753 (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)). The federal government has a legitimate interest in protecting the policies of the individual states with regard to lotteries. As noted above, that interest is directly advanced by the restrictions.

The plaintiff's contention that this regulatory scheme is riddled with inconsistencies has already been addressed. The exception in section 1307 for state-conducted lotteries is narrow. Newspapers in those states can publish advertising and information related to the state-conducted lotteries only. They are not free to publish advertisements for a private lottery because of that exception. Section 1307 represents a reasonable balancing of the interests of those states which conduct lotteries with the concerns of those states which do not.

Second, MNA has asserted that the restrictions discriminate unfairly against less prosperous lottery sponsors which cannot afford alternate forms of advertising. The court notes, first, that these lottery sponsors are not parties in this action. MNA has not asserted that it has standing to argue the claims of these third parties. Nonetheless, the court will address this issue.

The plaintiff's assertions go to the discriminatory impact of these statutes. MNA has not argued that the statutes were promulgated with the intent to discriminate against less prosperous lottery sponsors. If the statutes do have the asserted impact, and no facts are in the record to indicate such, the plaintiff's argument is flawed because MNA no where suggests the existence of a discriminatory intent. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

D. 39 U.S.C. §§ 3001 and 3005

Section 3001 provides, *inter alia*, that matter which is punishable under 18 U.S.C. § 1302 is nonmailable. This provision must be applied consistent with the court's holding on 18 U.S.C. § 1302.

Section 3005 is a broadly worded provision which has remained in the background of this suit. The court simply directs that this section shall not be enforced in a manner which is inconsistent with the court's holding on 18 U.S.C. § 1302. In other words, section 3005 shall not be applied to prevent the mailing of newspapers containing news reports on lotteries, including news reports containing prize lists, or editorial comment on lotteries.

CONCLUSION

The restriction in 18 U.S.C. § 1302 on the mailing of lottery advertisements is constitutional under the standards set out in *Central Hudson*. The restriction on the mailing of lists of prizes does not survive constitutional scrutiny because the government has not established the compelling interest necessary to justify this content-based prohibition. The statute, strictly construed, does not apply to news reports or editorials. Finally, the restriction on lot-

tery advertising does not offend the principles of equal protection.

Accordingly, IT IS ORDERED that:

1. The motion of defendant Postmaster General for summary judgment is PARTIALLY GRANTED and the motion for plaintiff MNA is PARTIALLY DENIED. The court declares that the restriction in 18 U.S.C. §§ 1302 on the mailing of advertisements for lotteries is constitutional and fully enforceable.

2. The motion of plaintiff MNA for summary judgment is PARTIALLY GRANTED and the motion of defendant Postmaster General is PARTIALLY DENIED. The court declares that the restrictions in 18 U.S.C. § 1302, and its implementing regulations, on the mailing of lists of prizes awarded from a lottery are unconstitutional. The defendant is permanently enjoined from further enforcement of the restrictions on prize lists.

3. The motion of defendant Postmaster General to strike affidavits is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 31, 1987

/s/ PAUL A. MAGNUSON
Paul A. Magnuson
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CV 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC.,

v.

POSTMASTER GENERAL OF THE U.S.,
U.S. POSTAL SERVICE, U.S.A.

Judge MAGNUSON

[January 6, 1988]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the motion of deft. Postmaster General for summary judgment is Partially Granted and the motion of Pltf. MNA is PARTIALLY DENIED; the motion of pltf. MNA for summary judgment is Partially Granted and the motion of deft. Postmaster General is Partially Denied; the deft. is permanently enjoined from further enforcement of the

restrictions on prize lists; the motion of deft. Postmaster General to strike affs. is denied.

Date: 1-6-88

Francis E. Dosal
Clerk

Pat Kegley
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF

v.

POSTMASTER GENERAL OF THE UNITED STATES, UNITED STATES POSTAL SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS

[Filed January 28, 1988]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Postmaster General of the United States, the United States Postal Service, and the United States of America, the defendants in the above-captioned case, hereby appeal to the Supreme Court of the United States from the final judgment of the United States District Court for the District of Minnesota, holding 18 U.S.C. § 1302 in part unconstitutional on December 31, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

JEROME G. ARNOLD
United States Attorney

LYNN A. ZENTNER
Assistant United States Attorney

Of Counsel:

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/s/ THEODORE C. HIRT
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Counsel for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-86-806

MINNESOTA NEWSPAPER ASSOCIATION, INC., PLAINTIFF

v.

POSTMASTER GENERAL OF THE UNITED STATES, UNITED STATES POSTAL SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT OF SERVICE

I hereby declare under penalty of perjury under the laws of the United States of America that service of defendants' Notice Of Appeal To The Supreme Court Of The United States has been made upon plaintiff by mailing by DHL delivery a copy thereof to:

Mark R. Anfinson, Esq.
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408

on this 27th day of January, 1988.

Such service is made in compliance with Supreme Court Rule 28.5(c).

/s/ C. GAIL WALKER
C. GAIL WALKER

Sworn and subscribed to before me this 27th day of January, 1988.

/s/ ALICE FAY PRINCE
NOTARY PUBLIC

My Commission Expires August 14, 1989.

APPENDIX D

1. Article I, § 8, Cl. 7 of the Constitution of the United States provides, in relevant part, as follows:

> The Congress shall have Power * * * To establish Post Offices and Post Roads.

2. The First Amendment to the Constitution of the United States provides, in relevant part, as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

3. 18 U.S.C. 1301 provides as follows:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

4. 18 U.S.C. 1302 provides as follows:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

5. 18 U.S.C. 1303 provides as follows:

Whoever, being an officer or employee of the Postal Service, acts as agency for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift

enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than $100 or imprisoned not more than one year, or both.

6. 18 U.S.C. 1307 provides as follows:

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—

(1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wager on sporting events or contests.

7. 39 U.S.C. 3001(a) provides, in relevant part, as follows:

Matter the deposit of which in the mails is punishable under section 1302 * * * of title 18 * * * is nonmailable.

8. 39 U.S.C. (& Supp. III) 3005 provides as follows:

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payments by a postmaster to the person or his representative of any money order

or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note; and

(3) requires the person or his representative to cease and desist from engaging in any such scheme, device, lottery, or gift enterprise.

For purposes of the preceding sentence, the mailing of matter which is nonmailable under such section 3001(d) by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) As used in this section and section 3006 of this title, the term "representative" includes an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

(d) Nothing in this section shall prohibit the mailing of (1) a newspaper of general circulation containing advertisements, lists of prizes, or information concerning a lottery conducted by a State acting under authority of State law, published in that State, or in an adjacent State which conducts such a lottery, (2) tickets or other materials concerning such a lottery within that State to addresses within that State, or (3) an advertisement promoting the sale of a book or

other publication, or a solicitation to purchase, or a purchase order for any such publication, if (A) such advertisement, solicitation, or purchase order is not materially false or misleading in its description of the publication; (B) such advertisement, solicitation, or purchase order contains no material misrepresentation of fact: *Provided, however,* That no statement quoted or derived from the publication shall constitute a misrepresentation of fact as long as such statement complies with the requirements of subparagraphs (A) and (C); and (C) the advertisement, solicitation, or purchase order accurately discloses the source of any statements quoted or derived from the publication. Paragraph (3) shall not be applicable to any publication, advertisement, solicitation, or purchase order which is used to sell some other product in which the publisher or author has a financial interest as part of a commercial scheme. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(e)(1) In conducting an investigation to determine if a person is engaged in any of the activities covered by subsection (a) of this section, the Postmaster General (or any duly authorized agent of the Postmaster General) may tender, at any reasonable time and by any reasonable means, the price advertised or otherwise requested for any article or service that such person has offered to provide through the mails.

(2) A failure to provide the article or service offered after the Postmaster General or his agent has tendered the price advertised or otherwise requested in the manner described in paragraph (1) of this

subsection, and any reasons for such failure, may be considered in a proceeding held under section 3007 of this title to determine if there is probable cause to believe that a violation of this section has occurred.

(3) The Postmaster General shall prescribe regulations under which any individual seeking to make a purchase on behalf of the Postal Service under this subsection from any person shall—

(A) identify himself as an employee or authorized agent of the Postal Service, as the case may be;

(B) state the nature of the conduct under investigation; and

(C) inform such person that the failure to complete the transaction may be considered in a proceeding under section 3007 of this title to determine probable cause, in accordance with paragraph (2) of this subsection.

9. Section 123.42 of the Domestic Mail Manual (1988) provides as follows:

.42 Lottery Matter (18 U.S.C. 1302)

.421 Any scheme or promotion, whether or not lawful under the laws of any state, which, upon payment of consideration, offers a prize dependent in whole or in part upon lot or chance, is a lottery.

.422 The following matter is unlawful mail matter:

a. Any letter, package, postal card, or circular which advertises, invites or otherwise permits or facilitates participation in a lottery.

b. Any lottery ticket or part thereof or substitute.

c. Any form of payment for a lottery ticket or share.

d. Any newspaper, circular, pamphlet, or publication of any kind containing any advertising of a lottery or similar enterprise, or any list of prizes awarded in such an enterprise.

.423 This section does not apply to any fishing contest not conducted for profit, wherein prizes are awarded for the species, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event (18 U.S.C. 1305).

.424 This section does not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of its law contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or to the mailing to addresses within a State of tickets or other material concerning a lottery conducted by that State under the authority of its law (18 U.S.C. 1307).

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